U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, D.C. 20001-8002

DATE: May 27, 1998
CASE NO.: 96-INA-394

In the Matter of:

IL FORNO, INC.,
Employer,

on behalf of

EDNA B. FILLIPINI,
Alien.

Appearances: Samuel G. Kooritzky, Esq.,
for Employer and Alien

Before: Burke, Wood and Vittone
Administrative Law Judges

DECISION AND ORDER

Per Curiam: This case arises from Il Forno's ("Employer") request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of an application for alien labor certification on behalf of Edna B. Fillipini ("Alien").[1]

This decision is based on the record upon which the CO denied certification and Employer's request for review, as contained in the Appeal File ("AF"), and any written arguments. 20 C.F.R. §656.27(c).

STATEMENT OF THE CASE

On October 27, 1994, the Employer, Il Forno, Inc., filed an application for labor certification to enable the Alien, Edna B. Fillipini, to fill the position of "Cook- Italian." (AF 29). The job duties required the ability to prepare, season and cook a variety of dishes, including soups, sauces, salads, meats, seafood, vegetables and other foodstuffs, dividing them into portions, garnishes and serving to waiters on order. The hours were from 4:00 a.m. to 1:00 p.m. The job requirements were two years of experience and the ability to work varying shifts and

[1] The certification of aliens for permanent employment is governed by §212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and Title 20 Part 656 of the Code of Federal Regulations. Unless otherwise noted, all regulations cited to in this decision are in Title 20.

weekends and to be fully experienced with Italian cooking.

In a Notice of Finding ("NOF") dated March 7, 1995, the CO proposed to deny certification. The CO found, after a review of the application and menu submitted,that it was appropriate to change the title of the position in question from Cook, Foreign Specialty to Cook, Specialty. The change was based upon the limited nature of the restaurant menu, which offered pasta, pizza and sandwiches. Since the position of Cook, Specialty, has an experience requirement of six months to one year, Employer's stated requirement of two years of experience was unduly restrictive. Employer was advised it could rebut this finding by submitting evidence that its requirement arose from a business necessity or by reducing the requirements to the DOT standard and re-advertising.

Counsel for Employer submitted rebuttal on April 3, 1995, expressing the "shock, dismay, embarrassment and disbelief" felt by Employer in receiving the NOF, which advised it that his "thoroughly trained and highly skilled cook of Foreign cuisine was in fact a fast food cook." (AF 13). In response to the NOF, Employer stated that (1) it serves a variety of international dishes containing complicated ingredients; (2) any incumbent must undergo an apprenticeship which requires literally years of training; (3) it is "insulting and ridiculous" to expect a fast food cook to perform the duties of this position; and (4) the description in the Dictionary of Occupational Titles (DOT) for Cook, Specialty, Foreign Food is far more applicable to the position than Cook, Fast Food.

Additional evidence submitted on rebuttal consisted of photographs of the food served, as well as a statement, unsigned, and attached to Employer's counsel's letter. (AF 14). Therein, it was stated that Employer is a full service Italian Restaurant with a very large clientele. While the menu is relatively simple, the carefully selected dishes offered are full scale ethnic cuisine made from scratch. Due to the ethnic nature of the dishes and the very complex preparation and cooking requirements of a number of menu offerings, the cook must undergo vocational or apprenticeship training, followed by months of internship before he can be trusted to prepare the main dishes. Employer claimed that by classifying the position as fast food cook, the CO implied that it was possible to take a cook out of any fast food operation and expect that cook to function effectively as a cook for Employer, which obviously, was out of the question and unimaginable. It was further alleged that the position required the ministrations of a full-fledged and experienced professional cook, whose skills far exceeded those of even the very best fast food cooks. While a cook may prepare fast food 99% of the time, the need to produce highly complex dishes 1% of the time required that the job be classified as a full scale professional Cook-Restaurant or Cook Ethnic Food instead of Fast Food Cook. Employer argued that any job with a variety of duties must be classified at the level justified by its most complex task.

In a Final Determination ("FD") dated October 18, 1995, the CO denied certification. (AF 7). The CO determined that the items listed on the menu did not represent a broad variety of foods, nor did they require extensive preparation and cooking time. The CO pointed out that the job classification is based on the totality of the job. If the one percent concept, as argued by Employer, were accepted, employers could create positions, that accommodated the Alien, by

including a job duty which would exclude all U.S. workers, but not be a significant duty.

The CO found that there was no documentation in the file that the Alien attended any vocational or apprenticeship training, as Employer had alleged is required for the position. The CO stated that a Cook, Specialty, Foreign Food, would be employed in a restaurant with a wait staff, preparing a full range of Italian specialties, while Employer's limited foreign dishes were easily prepared and did not require the skills of a Cook, Foreign Specialty. The CO also noted that the position was not changed to Cook, Fast Food, as alleged by Employer, but to Cook, Specialty, which job description includes "Specialty" dishes, of which there are five on Employer's menu. Employer had failed to establish that it would take two years of experience to learn to prepare these five dishes. On November 22, 1995, Employer filed its appeal. (AF 1).

DISCUSSION

Section 656.21(b)(2) proscribes the use of unduly restrictive job requirements in the recruitment process. An employer cannot use requirements that are not normal for the occupation or are not included in the Dictionary of Occupational Titles unless it establishes a business necessity for the requirement. The purpose of §656.21(b)(2) is to make the job opportunity available to qualified U.S. workers. Rajwinder Kaur Mann, 95-INA-328 (Feb. 6, 1997).

Employer can establish a business necessity by showing that (1) the requirement bears a reasonable relationship to the occupation in the context of the Employer's business; and (2) the requirement is essential to performing, in a reasonable manner, the job duties as described by the Employer. Information Industries, Inc., 88-INA-82 (Feb. 9, 1989)(en banc). Vague and incomplete rebuttal documentation will not meet the employer's burden of establishing business necessity. Analysts International Corporation, 90-INA-387 (July 30, 1991).

Employer argues that it is a full-scale ethnic restaurant and that therefore, the position involves preparation of carefully selected dishes which are comparable to those found in the very best Italian restaurants. Employer contends that it serves complete, sit-down, waiter-serviced dinners in a formal ethnic dining environment, with a menu ranging from "appetizers to soups to salads to desserts - along with wines and other accompanying meal-oriented liquid refreshments of a formal nature (i.e. not soft drinks)."

In the instant case, Employer has done no more than make unsubstantiated assertions that the position at issue is that of a Cook, Specialty, Foreign Food. In order to demonstrate business necessity an employer must show factual support or a compelling explanation. ERF, Inc., 89-INA-105(Feb. 14, 1990). Unsupported conclusions are insufficient to demonstrate that the job requirements are supported by business necessity. See Alfa Travel, 95-INA-163 (Mar. 4, 1997).

Employer relies upon its menu, as documentation of the business necessity of the experience requirement. The menu lists soda sold by the pitcher, five pasta dishes, four with red sauce, one with calamari in red sauce, pizza with various toppings, "Sandwich Melts," consisting of five different toppings, each garnished with pickle and chips, three deep-fried vegetables, and

deep-fried calamari. There is also Il Forno soup, and three salads.

These items may be made from scratch, as Employer insists; however, there is no evidence to support Employer's argument that it would take two years to learn to prepare these items, nor is there any evidence supporting Employer's argument that the DOT classification given by the CO is not the correct one. Contrary to Employer's assertion, the CO did not contend that the position was that of a Fast Food Cook, but rather a Cook, Specialty.

In the instant case, Employer's menu does not justify the classification of the position at issue as that of Cook, Specialty, Foreign Food. See, Why Not, Inc., 94-INA-603 (Aug. 31, 1995) (Employer has not met burden of showing reasonable need for cook with two years experience in Middle Eastern cooking in shop that otherwise looks just like a deli/carry out business). Finding no error in the CO's determination or classification of the job at issue, and Employer having failed to establish a business necessity for the two year experience requirement, certification was properly denied.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

SO ORDERED.

Entered at the direction of the panel:

Todd R. Smyth, Secretary to the Board
of Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of Board decisions; or (2) when the proceeding involves a question of exceptional importance. Petitions for review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W.
Suite 400 North
Washington, D.C., 20001-8002.

Copies of the petition must also be accompanied by a written statement setting forth the date and

manner of that service. The petition must specify the basis for requesting review by the full Board, with supporting authority, if any, and shall not exceed five double-spaced typed pages. Responses, if any, must be filed within ten days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition the Board may order briefs.